UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, ex rel. W.W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma, Plaintiffs, v. Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Aviagen, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc., and Willow Brook Foods, Inc., Defendants.	05-CV-0329 GKF-SAJ **THE CARGILL DEFENDANTS' MOTION TO COMPEL PLAINTIFFS TO DESIGNATE DEPONENTS UNDER RULE 30(b)(6)**

Defendants Cargill, Inc. and Cargill Turkey Production, LLC ("the Cargill Defendants") respectfully move the Court for an order compelling Plaintiffs to immediately provide dates for the depositions of Plaintiffs' designees for the categories of information set forth in the Cargill Defendants' 30(b)(6) deposition notices. Despite numerous oral and written requests from Cargill Defendants' attorneys to Plaintiffs' attorneys, Plaintiffs have thus far refused either to produce designees on the noticed dates or to propose any dates for these depositions.

PROCEDURAL BACKGROUND

On August 17, 2007, the Cargill Defendants served on Plaintiffs' counsel five deposition notices pursuant to Fed. R. Civ. P. 30(b)(6). Each of the notices required Plaintiffs to designate and produce a witness to testify concerning their knowledge of several issues in one of five

discrete subject areas (alleged pollutants and contaminations, grower interaction, alleged human health hazards, alleged runoff and releases, and alleged legal violations). Each of these subject areas corresponds to factual allegations Plaintiffs make against the Cargill Defendants in their Second Amended Complaint. The Cargill Defendants' cover letter for the deposition notices stated that the Cargill Defendants would be flexible concerning the dates of the depositions and invited Plaintiffs to propose alternative dates should the dates in the notices prove unworkable. (See Exhibit 1.)

On August 22, 2007, the Cargill Defendants' attorneys wrote a follow-up letter to Plaintiffs' attorneys noting that one of the depositions had inadvertently been scheduled for the Labor Day holiday, and proposed scheduling the depositions for September 3, 4, 11, and 12. The letter also asked that, if Plaintiffs found those dates unworkable, they propose an alternative schedule. (See Exhibit 2.)

On August 24, 2007, Plaintiffs' attorney Robert Nance wrote back to the Cargill Defendants stating that "given the breadth and depth of these notices, and other depositions already noticed, the State will be unable to identify and prepare appropriate witnesses even by the schedule proposed in your letter of August 22." (See Exhibit 3.) Rather than providing proposed alternate dates, however, Plaintiffs expressed concern about the possibility that other Defendants might at some future time serve similar Defendant-specific deposition notices and proposed some sort of "consolidated" deposition that would cover all of the Defendant-specific topics for all 11 Defendants that might be covered in all of the theoretical future deposition notices. (See Exhibit 3.)

The Cargill Defendants replied by letter on August 27, 2007, noting that the subject of their proposed depositions were specific to Plaintiffs' claims against the Cargill Defendants and

thus were not suitable for consolidation with whatever potential depositions other Defendants might wish to notice in the future. The Cargill Defendants also noted that, given the existing Scheduling Order, they could not realistically wait for these depositions until other Defendants noted other depositions at some unknown time. Cargill Defendants once again asked Plaintiffs to propose dates for the depositions. (See Exhibit 4.)

On September 6, 2007, having received no response from Plaintiffs' attorneys to the August 27 letter, the Cargill Defendants' attorneys sent an email to the Plaintiffs' attorneys requesting a meet-and-confer on the issue of scheduling the 30(b)(6) depositions. (See Exhibit 5.) On September 7, 2007, Plaintiffs' attorneys wrote back, once again insisting on the consolidation of the Cargill Defendants' 30(b)(6) depositions with potential, not-yet-noticed depositions by other Defendants. Plaintiffs insisted without explanation that many of the Cargill-specific topics included in the Cargill Defendants' deposition notices (which include issues such as how the Cargill Defendants or their contract growers have allegedly failed to properly manage, store, or dispose of their poultry litter and how they have allegedly violated state regulations governing application of poultry litter) will somehow be the same for all Defendants. The letter did not propose any dates for the noticed depositions and did not respond to the Cargill Defendants' request to schedule a meet-and-confer on the issue. (See Exhibit 6.) At the same time, Plaintiffs sent letters to the attorneys for other Defendants proposing that those Defendants agree to consolidate unspecified future depositions with the already noticed Cargill-specific 30(b)(6) depositions. (See Exhibit 7.)

The Cargill Defendants replied to Plaintiffs by return letter also dated September 7, 2007, expressing their disappointment at Plaintiffs' failure to provide any proposed deposition dates, to offer any witnesses on any of the topics noticed, or to respond to the request to meet and confer.

The Cargill Defendants restated their need and intention to move forward with the noticed depositions, and asked that the State provide dates for the depositions no later than September 12, 2007 or face a motion to compel. (See Exhibit 8.) In the following days, the other Defendants replied to Plaintiffs' consolidation proposal, all declining for various reasons. (See Exhibit 9.)

By letter dated September 12, 2007, Plaintiffs once again responded to the Cargill Defendants' request, refusing yet again to provide any dates for the noticed depositions. Plaintiffs once again noted their proposal to other Defendants, despite the universally negative response to the proposal by other Defendants. Plaintiffs also generally asserted for the first time (nearly a month after the service of the notices) that Plaintiffs had substantive objections to some of the deposition topics, but failed to raise any specific objections or identify any of the topics to which Plaintiffs' unstated objections related. Plaintiffs also proposed a meet-and-confer session on the as-yet unrevealed objections, but stated that their attorney's schedule would not permit such a conference for approximately two weeks. (See Exhibit 10.)

The Cargill Defendants replied on September 13, 2007, noting that all of the other Defendants had rejected Plaintiffs' consolidation suggestion. The Cargill Defendants also restated their intention to proceed promptly with the depositions notwithstanding any objections Plaintiffs might have, preferring to address any such objections in the context of the deposition, as Plaintiffs had done with their 30(b)(6) deposition of Defendant Peterson Farms. (See Dkt. No. 1250.) The Cargill Defendants reiterated that the only barrier to the depositions proceeding was Plaintiffs' refusal to provide dates, that the parties had conferred repeatedly on the Cargill Defendants' request for dates, and that the resolution of the issue was in Plaintiffs' hands: either Plaintiffs would provide dates for the depositions, or they would not. The Cargill Defendants

asked Plaintiffs to provide dates by noon on September 17 or the Cargill Defendants would move to compel. (See Exhibit 11.) The State did not respond or provide any such dates, and this motion follows.

DISCUSSION

The Cargill Defendants urge the Court to require Plaintiffs to promptly provide dates for the depositions of witnesses designated to testify on the issues contained in the Cargill Defendants 30(b)(6) deposition notices. Federal Rule of Civil Procedure 30(a)(1) provides that "[a] party may take the testimony of any person, including a party, by deposition upon oral examination without leave of the court." Rule 30(b)(6) further provides:

> A party may in the party's notice . . . name as the deponent a . . . governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. . . . The persons so designated shall testify as to matters known or reasonably available to the organization.

The Cargill Defendants' 30(b)(6) deposition notices fully comply with the requirements of Rules 30(a)(1) and 30(b)(6), and Plaintiffs have not claimed otherwise. Although Plaintiffs have alluded to unspecified objections to some of the deposition topics, the Cargill Defendants intend to move forward with the depositions themselves not withstanding any such objections and deal with those objections, if any, in the context of the deposition in which they are raised.

Plaintiffs have offered no legal ground for their refusal to provide dates for the depositions, relying solely on their own preference to save time and money by Defendants to consolidate un-noticed potential depositions with actually noticed Defendant-specific depositions on the theory that all such depositions might address similar issues. Plaintiffs' proposal is perfectly proper as a *suggestion*; indeed, parties should always be on the lookout for ways to

make discovery more efficient. Here, however, both the Cargill Defendants and all the other Defendants have declined Plaintiffs' suggestion, noting that Plaintiffs' inadequate responses to other discovery requests, differences in discovery timing, and in particular differences in the subject matter and focus of the respective Defendants' discovery efforts make such a consolidation unworkable. Notwithstanding Defendants' refusals, Plaintiffs have sought to enforce their "suggestion" by flatly refusing to appear at or provide alternative dates for the Cargill Defendants' already noticed depositions.

Neither the Rules nor the case law provide any authority for one party to dictate another party's litigation strategy through unilaterally imposed restrictions on discovery. On the contrary, Rule 26(d) specifically provides:

> [M]ethods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.[1]

Various discovery devices thus "may be utilized independently, simultaneously, or progressively, so long as the requirements of the rule or rules invoked are met." Hawaiian Airlines, Ltd. v. Trans-Pacific Airlines, Ltd., 8 F.R.D. 449, 451 (D. Haw. 1948); see also Control Data Corp. v. Int'l Bus. Mach. Corp., 306 F. Supp. 839, 849-50 (D. Minn. 1969) (holding discovery procedures would be reciprocal and apply simultaneously to plaintiffs and defendants).

Plaintiffs' current Complaint makes allegations of specific conduct against the Cargill Defendants and their alleged agents, the contract growers. The Cargill Defendants have served written discovery seeking the basis for these claims and, as the Court is aware from other motions, has had a difficult time getting Plaintiffs to fully respond to these discovery requests.

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[1] Under the amendments to the Rules of Civil Procedure proposed to go into effect on December 1, 2007, this passage will be revised to read: "(A) methods of discovery may be used in any sequence; and (B) discovery by one party does not require any other party to delay its discovery."

Nevertheless, given the present posture and status of the case, the Cargill Defendants have determined as a matter of litigation strategy that they must go forward with 30(b)(6) depositions concerning the factual bases for Plaintiffs' allegations about the Cargill Defendants' conduct.[2] This strategy is reasonable, and even if it were not, it is the Cargill Defendants' strategy to determine, not Plaintiffs'.

Other Defendants have taken the position that they want fuller responses to written discovery before they notice similar 30(b)(6) depositions concerning the particular allegations against their Defendants. E.g., (See Exhibit 9.) This position is also reasonable. Again, those strategies are up to the other Defendants, not up to Plaintiffs. Neither the Federal Rules nor universally accepted discovery practices permit one party to coerce another to employ one litigation strategy over another simply by refusing to permit discovery unless the discovery is done as the first party deems convenient.

Moreover, Plaintiffs' assertion that the Cargill-specific topics of the current 30(b)(6) deposition notices will produce essentially the same testimony as future notices from other Defendants, (See Exhibit 6), simply does not bear scrutiny. The topics in the Cargill Defendants' deposition notices are narrowly tailored to address Plaintiffs' specific factual allegations concerning Cargill, Inc. and Cargill Turkey Production, LLC. For example, the topics include:

- the ways in which Plaintiffs claim that the Cargill Defendants or their contract growers have failed to properly manage, store, or dispose of poultry litter;

[2] In contrast, Plaintiffs' recalcitrance in responding to the Cargill Defendants' written discovery requests *has* severely inhibited the Cargill Defendants' ability to effectively take depositions concerning other issues in the case, including issues critical to the Cargill Defendants' affirmative defenses. The Cargill Defendants have therefore delayed noticing those other depositions.

- specific instances of runoff or release of pollutants from property owned, managed, or controlled by the Cargill Defendants or their contract growers, and
- specific actions of the Cargill Defendants or their contract growers that Plaintiffs allege create "unreasonable and substantial danger to the public's health and safety." (See Exhibit 1.)

To prove their case at trial, Plaintiffs must offer evidence supporting the claims in their Complaint that the Cargill Defendants or their alleged agents—not other Defendants or unrelated parties—*actually* engaged in the conduct the Complaint alleges. Regardless of whether Plaintiffs characterize such evidence as "direct" or "circumstantial," Plaintiffs must at some point try to establish a factual link between the conduct alleged and the Cargill Defendants. It is those links to which the Cargill Defendants' current 30(b)(6) deposition notices are directed, links that are necessarily unique to the Cargill Defendants.

Contrary to Plaintiffs' apparent belief, this is not a case where "the poultry industry" is on trial. Plaintiffs' current Complaint does not allege that the Cargill Defendants are vicariously liable for the conduct of any of the other Defendants or their alleged agents. Plaintiffs' Complaint does not allege any theory of "market-share liability," "alternative liability," "concerted action," or "enterprise liability," through which the actions of one member of a group can be imputed in whole or in part to all members.[3] (See Dckt. 1215.) Plaintiffs' Complaint does not seek to have the case certified as a defendant class action under Rule 23, (See Dckt. 1215) which would permit a fact finder to view the conduct of one defendant as

[3] Plaintiffs have prudently omitted any such legal theories from their Complaint. Under the circumstances of the present case, such theories of recovery would fail as a matter of law. See, e.g., Case v. Fibreboard Corp., 743 P.2d 1062, 1065-67 (Okla. 1987) (rejecting market-share liability, enterprise liability, alternative liability, and concert-of-action liability in context of asbestos claims); see also Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986) (analyzing and rejecting enterprise, alternative, and market-share liability in context of DES litigation).

representative of that of all defendants.[4] Instead, Plaintiffs have pleaded and must prove claims asserting specific conduct by Cargill, Inc, and Cargill Turkey Production, LLC as individual Defendants. Under these circumstances, there can be no serious question that the Cargill Defendants are entitled to depose Plaintiffs concerning Plaintiffs' claims against the Cargill Defendants on the Cargill Defendants' own terms, and without any attempts by Plaintiffs to confuse or intermix the facts claimed to support those allegations with issues related to other Defendants.

Finally, Plaintiffs' refusal to provide dates for depositions without coerced consolidation rests entirely on speculation. No other Defendant has yet noticed any 30(b)(6) deposition of Plaintiffs that is remotely similar to those noticed by the Cargill Defendants, nor has any other Defendant indicated any present intention to do so. Indeed, at least one defendant has stated that it intends to notice Plaintiffs' 30(b)(6) deposition, if at all, only after Plaintiffs cure the defects in their other discovery responses. (See Exhibit 9.) Assuming for the sake of argument that one or more of the other Defendants actually *will* notice a 30(b)(6) deposition of Plaintiffs at some point in the future, neither the Court, nor the Cargill Defendants, nor Plaintiffs have any way of telling *when* such a deposition might be noted or *what* specific topics such a notice might contain. Plaintiffs improperly insist that the Cargill Defendants delay their depositions of Plaintiffs on these critical Cargill-specific issues so that those depositions can be consolidated with merely theoretical depositions that may be noticed at some time in the future and may address similar topics, all because Plaintiffs and their attorneys wish it so. The Cargill Defendants respectfully

[4] Again, under the circumstances here, such an effort would be futile. See Lynch Corp. v. MII Liquidating Co., 82 F.R.D. 478, 481 (D.S.D. 1979) (holding certification of defendant class requires satisfaction of all Rule 23 requirements, including a class so numerous as to make joinder impracticable and representative defendants "typical" of entire class).

suggest that Plaintiffs' position is unreasonable and does not justify their refusal to provide the deponents as required by Rule 30(b)(6).

CONCLUSION

For the reasons discussed above, Cargill, Inc. and Cargill Turkey Production, LLC urge this Court to grant their motion and to order Plaintiffs to provide, within seven days of the date of the Order, proposed dates for the noticed 30(b)(6) depositions, such dates not to be beyond 30 days from the date of the Court's Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 17th day of September, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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